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CONSTITUTIONAL LAW—EQUAL PROTECTION—ALIENS' RIGHTS—PARTICIPATION IN ASSISTANCE FUNDS FOR HIGHER EDUCATION—STANDARD OF REVIEW—The Supreme Court of the United States has held that a state statute denying resident aliens equal access to higher education assistance funds will be subject to the strict scrutiny standard of review even though the statute neither creates a per se classification nor causes a denial of benefits essential for economic survival.

Nyquist v. Mauclet, 432 U.S. 1 (1977).

Two resident aliens of the State of New York, appellees Jean-Marie Mauclet and Alan Rabinovitch,[1] applied for financial assistance to pursue higher education within the state.[2] However, in accordance with section 661(3) of New York's higher education laws which restricted participation by aliens in educational assistance funds, each was denied any assistance.[3] Seeking relief,[4] appellees each brought suit in a New York federal district court against the State of New York and those officials responsible for administering assistance funds, alleging that the citizenship requirement was unconstitutional.[5] The three-judge district court convened to hear the

1. Appellee Mauclet is a citizen of France, but has been a permanent resident of the United States since November of 1969. He is married to a United States citizen, and has a child by that marriage who is also a United States citizen. Appellee Rabinovitch is an unmarried Canadian citizen who has lived in this country as a permanent resident alien since 1964. He registered with the Selective Service on his eighteenth birthday, and graduated from the New York public school system. Nyquist v. Mauclet, 432 U.S. 1, 4-5 (1977).

2. New York provides financial assistance primarily in three forms. The first is the Regents College Scholarship, awarded on the basis of performance in a competitive examination. A second form of aid is the tuition assistance award; these are noncompetitive and the amount of the award is based upon both tuition and income. The state guaranteed student loan is the third form of assistance. *Id.* at 2-3.

3. N.Y. EDUC. LAW § 661(3) (McKinney Supp. 1977-1978). Section 661(3) reads in relevant part: "Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming an intent to apply as soon as eligible for citizenship . . . ." Mauclet applied for the tuition assistance award, but his application was not processed because of his refusal to apply for United States citizenship. Rabinovitch was informed that he qualified for, and was entitled to, a Regents College Scholarship and tuition assistance award as the result of a commendable performance on the Regents Qualifying Examinations. However, Rabinovitch was later apprised that the scholarship offer was being withdrawn since he intended to retain his Canadian citizenship. 432 U.S. at 4-5.

4. Both appellees sought a judgment declaring § 661(3) invalid, enjoining its enforcement, and requiring the state to process the applications for assistance. Additionally, appellee Rabinovitch requested damages for past monies withheld. Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976), *aff'd,* 432 U.S. 1 (1977).

5. Mauclet brought suit in the Federal District Court for the Western District of New

case decided unanimously in the appellees' favor.[6] Applying a strict scrutiny standard of review, the district court held that section 661(3) violated the equal protection clause of the fourteenth amendment in that the citizenship requirement discriminated unconstitutionally against resident aliens.[8] The district court concluded that the alien-appellees had the same rights as citizens to state financial assistance in New York[9] since the state had not demonstrated a compelling interest justifying its discriminatory classification.[10] The state appealed, and the United States Supreme Court noted probable jurisdiction.[11]

A 5-4 majority of the Court,[12] speaking through Justice Blackmun, also utilized a strict scrutiny standard of review and affirmed the decision of the district court in declaring the statute unconstitutional.[13] The Court began its analysis by disposing of the appellants'[14] contention that the challenged statute should not be sub-

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York, and Rabinovitch in the Eastern District, but the cases were consolidated because of their factual similarity and heard by a three-judge court pursuant to 28 U.S.C. § 2281 (1970) (repealed 90 Stat. 1119 (1976)), and 28 U.S.C. § 2284 (1970) (amended 90 Stat. 1119 (1976)).

6. 406 F. Supp. 1233 (W.D.N.Y. 1976), *aff'd*, 432 U.S. 1 (1977).

7. This strict standard of review is employed when the state legislation denies equal protection of the law to a class that the United States Supreme Court has deemed "suspect", or when it infringes upon a judicially recognized fundamental interest. Unlike the general standard that a statutory classification is constitutionally valid as long as it is rationally related to some legitimate state objective, strict scrutiny raises a strong presumption of invalidity, and only the most precisely drawn legislation, exhibiting some compelling interests, will pass constitutional muster. *See* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 605 (1976) (Court held invalid a Puerto Rican statute that permitted only United States citizens to practice privately as civil engineers). *See also* Comment, *Constitutional Law: Federal Economic Regulation of Alien Individuals—Looking for Equal Airspace in the Fifth Amendment*, 29 OKLA. L. REV. 409 (1976) [hereinafter cited as *Equal Airspace*]. In 1971, classifications based on alienage, like those based on race and nationality, were deemed inherently suspect and therefore subject to strict judicial scrutiny. *See* Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

8. 406 F. Supp. at 1236.

9. The Court granted the appellees' request for declaratory and injunctive relief, but held that an award of money damages would be inappropriate. *See* Edelman v. Jordan, 415 U.S. 651 (1974) (eleventh amendment bars federal courts from ordering state officials to remit benefits wrongfully withheld from eligible welfare applicants).

10. 406 F. Supp. at 1236. The court further expressed doubt as to whether the legislatively drawn classification would survive even the rational basis test. *But see* note 31 and accompanying text *infra*.

11. 429 U.S. 917 (1976).

12. The majority included Justices Blackmun, Brennan, Marshall, Stevens, and White. Chief Justice Burger, and Justices Powell, Rehnquist, and Stewart dissented.

13. 432 U.S. at 12.

14. The appellants in the case were the various individuals and corporate entities responsible for administering the state's educational assistance programs. *Id.* at 6.

jected to a strict scrutiny standard of review because the statute did not absolutely bar aliens from participating in educational assistance funds.[15] Relying on its 1971 decision of *Graham v. Richardson*,[16] the Court concluded that since the New York statute in *Mauclet*, like the statute in *Graham*, was directed at aliens only, and aliens alone were adversely affected, strict scrutiny application was warranted.[17] The discriminatory effect of section 661(3) against aliens as a class was not rendered inconsequential simply because an absolute bar to the receipt of educational assistance was not imposed.[18]

The Court also rejected the appellants' contention that there were adequate policy justifications for upholding section 661(3)—namely, that it was designed to offer an incentive for aliens to become naturalized, and was tailored to enhance the educational level of the electorate.[19] *Sugarman v. Dougall*[20] had implied in dictum that in exceptional circumstances, a state's interest in establishing its own form of government and preserving its political community might justify some statutes with alienage-based classifications and permit such state legislation to withstand even a strict scrutiny standard of review.[21] The majority in *Mauclet* observed, however, that the broad justifications offered by the appellants for section 661(3) swept far beyond the confines of the *Sugarman* excep-

15. *Id.* at 7-8. Section 661(3) permits aliens who have applied for citizenship, or, if not qualified for it, who have filed a statement of intent to apply as soon as eligible, to participate in the assistance programs. Thus, the appellants contended that the statute distinguished "only within the 'heterogeneous' class of aliens" and "does not distinguish between citizens and aliens *vel non*." *See* Brief for Appellants at 20, Nyquist v. Mauclet, 432 U.S. 1 (1977) [hereinafter cited as Brief for Appellants].

16. 403 U.S. 365 (1971). In *Graham*, the Court invalidated provisions of the Arizona welfare laws that conditioned receipt of benefits upon citizenship and durational residency requirements.

17. *Graham* held that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Id.* at 371-72.

18. 432 U.S. at 9.

19. *Id.* at 10. *See* Brief for Appellants, *supra* note 15, at 22-25.

20. 413 U.S. 634 (1973) (New York civil service law which provided that only citizens could hold permanent positions in the competitive class of state civil service held violative of fourteenth amendment equal protection clause).

21. *Id.* at 647-48. This narrow exception enunciated in *Sugarman* is apparently confined to establishing qualifications for persons holding state elective or important nonelective executive, legislative, and judicial positions. In fact, the Court has sustained only one state statutory scheme under the *Sugarman* exception, and this subsequent to the Court's decision in *Mauclet*. *See* Foley v. Connelie, 98 S.Ct. 1067 (1978) (New York statute limiting appointment of members of state police force to citizens of the United States did not violate the equal protection clause of the fourteenth amendment).

tion.[22] If encouragement of naturalization was accepted as a supporting rationale under the *Sugarman* exception, the majority believed that nearly any classification based on alienage could be similarly justified, and the exception would swallow the rule.[23] In response to the second justification offered by the appellants, the Court concluded that the state's alleged interest in educating the electorate would hardly be frustrated by extending assistance to resident aliens and providing resident aliens with the same educational opportunities provided to others.[24] Finally, aside from any justification offered by the state for section 661(3), the Court reasoned that since aliens are under the same obligation as citizens to pay their full share of taxes that support the assistance programs, it would not be unfair to allow them to participate in programs to which they contributed on an equal basis.[25]

Three separate dissenting opinions were written by members of the Court who sharply disagreed with the majority's equal protection analysis.[26] The dissenters maintained that since the New York legislature had not statutorily drawn the line between aliens, as a class, and citizens, but between aliens who chose to retain foreign citizenship and all others, the scheme did not discriminate against a suspect class.[27] The dissents emphasized that the primary reason aliens had previously been afforded the status of suspect classification was because, as a class, they were an example of a discrete and insular minority and identified by a status which they were powerless to change until they became eligible for citizenship.[28] Thus,

22. 432 U.S. at 11. The narrowness of the *Sugarman* exception is reflected in *In re* Griffiths, 413 U.S. 717 (1973), where the Court invalidated a state court rule limiting the practice of law to citizens, despite a recognition of the vital public and political role of attorneys.

23. *Id.*

24. *Id.* Perhaps the Court's reasoning was colored by a suggestion that the number of aliens disqualified by § 661(3) was exceedingly small, causing the inclusion of aliens in the assistance programs to have an insubstantial impact on the cost of the programs. *See id.* at n.15.

25. *Id.* In the dissenting opinion of Chief Justice Burger, he states that "New York, like most other States, does not have unlimited funds to provide its residents with higher education services . . . . [N]othing heretofore found in the Constitution *compels* a State to apply its finite resources to higher education of aliens who have demonstrated no permanent attachment to the United States and who refuse to apply for citizenship." *Id.* at 14.

26. Justice Powell dissented in an opinion joined by Justice Stewart and Chief Justice Burger. Justice Rehnquist's dissent was joined by Chief Justice Burger. The Chief Justice also wrote a separate dissent.

27. 432 U.S. at 15 (Powell, J., dissenting); *id.* at 17-22 (Rehnquist, J., dissenting).

28. *Id.* at 15-16 (Powell, J., dissenting); *id.* at 17-22 (Rehnquist, J., dissenting). *See* Graham v. Richardson, 403 U.S. at 372 (aliens as a class are a prime example of a discrete

aliens were afflicted by a disability that nothing except the passage of time could remove.[29] Therefore, the dissenters postulated, since the policy underlying the elevation of alienage classifications to the suspect category ceased once the New York legislature classified aliens in such a manner as to enable them to remove themselves from the disabled class at any time, the application of the strict scrutiny standard of review should also cease.[30] The dissenters then concluded that the rational basis test should be applied, and under that test the statute sustained, since the justifications offered by the appellants were tailored to attain legitimate state objectives.[31] Chief Justice Burger noted a further critical distinction between *Mauclet* and prior cases involving alienage-based classifications. Unlike *Mauclet,* Burger observed, all prior cases upon which the majority relied involved statutes that denied aliens an essential means of economic survival or access to the necessities of life.[32]

The *Mauclet* decision is the most recent development of the Court's position regarding the degree of constitutional protection guaranteed to aliens by the fourteenth amendment. Historically,

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and insular minority for whom such heightened judicial solicitude is appropriate). The Court first alluded to the term "discrete and insular minority" in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

29. 432 U.S. at 17-22 (Rehnquist, J., dissenting). Federal law generally requires five years residence by aliens lawfully admitted for permanent residence as a prerequisite to the seeking of naturalization. 8 U.S.C. § 1427(a) (1970).

30. 432 U.S. at 15-16 (Powell, J., dissenting); *id.* at 17-22 (Rehnquist, J., dissenting). Rehnquist had dissented in *Sugarman* and *In re* Griffiths on the basis that the fourteenth amendment equal protection clause was not intended by the drafters to render alienage a suspect classification. He was not yet a member of the Court when *Graham* was decided. Whether or not Rehnquist is willing to accept an evisceration of the position he adopted in *Sugarman* and *In re* Griffiths is not entirely clear. However, his basic proposition is that even if the majority's premise in *Graham, Sugarman,* and *In re* Griffiths—that per se classifications are inherently suspect—is accepted, one can still consistently disagree with the majority in *Mauclet* since no suspect class was created by the statute. The line drawn by the legislature was not drawn on the basis of a status that the included members were powerless to alter, nor were they categorized by a factor beyond their control.

31. 432 U.S. at 12-15 (Burger, C.J., dissenting); *id.* at 15-16 (Powell, J., dissenting); *id.* at 17-21 (Rehnquist, J., dissenting). Burger observed that "[t]he line drawn by the State is not a perfect one—and few lines can be—but it does provide a rational means to further the State's legitimate objectives." *Id.* at 14.

32. *Id.* at 12-13. *See, e.g.,* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976) (Puerto Rican statute permitted only United States citizens to practice privately as civil engineers); *In re* Griffiths, 413 U.S. 717 (1973) (Connecticut law deprived resident aliens of the right to take state bar examination); Sugarman v. Dougall, 413 U.S. 634 (1973) (participation in New York's competitive civil service limited to citizens); Takahashie v. Fish and Game Comm'n, 334 U.S. 410 (1948) (California statute prohibited the issuance of commercial fishing licenses to resident aliens).

although the Court had stated on several occasions that the equal protection clause was intended to protect aliens, the scope of that protection remained somewhat unclear.[33] However, in 1971, the landmark decision of *Graham v. Richardson*[34] spawned the genesis for the expansion of aliens' rights by elevating alienage to the same suspect class status as race[35] and nationality.[36] Since *Graham*, strict scrutiny has consistently been utilized as the standard of review when aliens have raised equal protection challenges to state legislation adversely affecting them.[37] Therefore, at first glance, the majority's conclusion that the result in *Mauclet* was mandated by the *Graham* rationale appears meritorious.[38] A closer analysis, however, reveals a specious opinion in which the Court has actually substituted a wooden, mechanical application of equal protection jurisprudence for a thorough and insightful equal protection analysis.[39]

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33. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (aliens are persons within the meaning of the fourteenth amendment whose guarantees extend to all persons without regard to difference of race, color, or nationality); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (the power of a state to apply its own laws exclusively to its alien inhabitants is confined within narrow limits).

34. 403 U.S. 365 (1971). *See* note 16 *supra*.

35. *See* Loving v. Virginia, 388 U.S. 1 (1967) (equal protection clause demanded that Virginia's miscegenation statutes, resting solely upon distinctions drawn according to race, be subjected to the most rigid scrutiny).

36. *See* Oyama v. California, 332 U.S. 633 (1948) (California Alien Land Law held to deny American citizen equal protection by discriminating solely on the basis of parent's country of origin); Hirabayashi v. United States, 320 U.S. 81 (1943) (distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality).

37. *See* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976) (state classifications based on alienage are subject to strict judicial scrutiny); *In re* Griffiths, 413 U.S. 717 (1973) (classifications based on alienage, being inherently suspect, are subject to close judicial scrutiny); Sugarman v. Dougall, 413 U.S. 634 (1973) (citing *Graham* for the proposition that classifications based on alienage are subject to close judicial scrutiny). *But see* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974) (author suggests that although the Court stated in *Graham* that it was using strict scrutiny because a suspect classification was involved, the Court was actually using the "demonstrable basis" test, and that this is the proper standard of review for classifications based on alienage) [hereinafter cited as Nowak].

38. 432 U.S. at 8. (Graham v. Richardson undermines the appellants' position).

39. Perhaps this is attributable in part to the rigid two-tiered standard that currently exists for reviewing equal protection challenges. Several commentators have suggested more flexible, middle-ground alternatives to the existing rational basis and strict scrutiny standards of review. *See, e.g.*, Coven & Fersh, *Equal Protection, Social Welfare Litigation, The Burger Court*, 51 NOTRE DAME LAW. 873 (1976) (unitary approach) [hereinafter cited as Coven & Fersh]; Nowak, *supra* note 37 (demonstrable basis test); Gunther, *Foreword: In Search of*

The critical issue confronting the Court was whether a state may *ever* create alienage-based classifications without automatically subjecting the legislation to a strict scrutiny standard of review. The majority's approach, bottomed on the application of prior case law, precluded any consideration of whether section 661(3) had actually created a suspect class that merited a strict scrutiny standard of review. Since the statutorily created class involved aliens, the Court simply reasoned that section 661(3) was therefore facially subject to a strict scrutiny reviewing standard, found no compelling state interests,[40] and inevitably invalidated the statute.[41]

A critical reading of *Mauclet* reveals that the majority's reliance upon prior case law was unfounded and that the prior case law should not have been dispositive of the issue here. An exegesis of the Court's prior decisions in this area discloses that the state legislation challenged in each case suffered from two distinct infirmities that justified the application of strict scrutiny. First, every previous statute invalidated by the Court either impaired an alien's ability to earn a livelihood by prohibiting engagement in certain occupations or professions,[42] or resulted in a denial of benefits essential for human sustenance.[43] More importantly, however, each previously invalidated statute discriminated against aliens as a class, and left resident aliens afflicted with a disability that nothing except the passage of time could remove.[44] The statute in *Mauclet* suffers from neither infirmity,[45] since it imposed neither a citizenship requirement nor a durational residency requirement as a prerequisite to the receipt of educational assistance funds, and it consequently appears that strict scrutiny should have been inapplicable.

The application of strict scrutiny to alienage classifications presents a unique problem because the underlying reason for elevating

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Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 HARV. L. REV. 1 (1972) (means-oriented review) [hereinafter cited as Gunther].

40. The Court, however, has not required the federal government to exhibit a compelling interest to justify regulations that classify on the basis of alienage. *See* Mathews v. Diaz, 426 U.S. 67 (1976) (Court applied relaxed scrutiny in upholding the validity of a federal medical insurance program that conditioned an alien's eligibility for participation on the satisfaction of a durational residency requirement, but imposed no similar burden on citizens).

41. *See* 432 U.S. at 12.

42. *See* note 32 *supra*.

43. *See* Graham v. Richardson, 403 U.S. 365 (1971) (Court invalidated provisions of the Arizona welfare laws that conditioned receipt of benefits upon citizenship and durational residency requirements).

44. *See* notes 29 and 32 *supra*.

45. *See* note 3 *supra*.

alienage to the suspect class status is apparently different from that which justifies affording a suspect class status to other minority groups. Although strict scrutiny application is limited to those statutory classifications that infringe upon the rights of a "suspect class,"[46] exactly what causes a classification to be characterized as suspect has never been fully explained by the Court, although a number of suggestions have been posited.[47] Perhaps the paramount reason that certain classifications are characterized as suspect emerges from the recognition that certain discrete and insular minorities[48] bear an immutable characteristic or trait that is beyond the power of the included members to control or change. Skin color and lineal ancestry are clear examples of immutable characteristics borne by minorities that warrant the application of strict scrutiny to classifications based on race[49] and national origin.[50] In both instances, the disability attaches at birth and is not within the control of the individual.

On the other hand, the distinguishing class character trait of aliens is not one that attaches at birth and remains unalterable throughout the lifetime of the individual. Rather, the immutable characteristic warranting the elevation of alienage-based classifications to the suspect category has traditionally been traceable to the residency requirement that aliens must fulfill before becoming eligible for citizenship.[51] When viewed in this light, aliens are a prime

46. Strict scrutiny is also applicable when state legislation infringes upon certain interests deemed to be fundamental under the Constitution. For example, in the areas of voting, interstate travel, procreation, and privacy, the Court will require that the state show a compelling and overriding interest to justify a dilution on infringement of these fundamental interests. *See* Canby, *The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism*, 1975 ARIZ. ST. L.J. 1, 7. However, the Court has held that education is not a fundamental interest. San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

47. *See* Coven & Fersh, *supra* note 39, at 876.

48. *See* note 28 *supra*.

49. That racial classifications are afforded a suspect class status may also be explained by reference to the historical basis of the fourteenth amendment. *See* Loving v. Virginia, 388 U.S. 1 (1967) (the clear and central purpose of the fourteenth amendment was to eliminate all official state sources of invidious racial discrimination).

50. *See* Hirabayashi v. United States, 320 U.S. 81 (1943) (distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality).

51. It has also been suggested that the reason alienage classifications are characterized as suspect emerges from a recognition that they are a politically impotent and disadvantaged minority who have no voice in the political process and no hope of effecting the desired change through the legislative body. *See* Note, *Developments in the Law—Equal Protection*, 82

example of a discrete and insular minority during the period that they remain ineligible for citizenship.[52] However, by enacting legislation that enables aliens to participate in state funds during the period that they remain ineligible for citizenship, the legislature has drawn the classification in such a manner that the infirmity justifying the application of strict scrutiny has been removed. *Mauclet* is a clear illustration.

In *Mauclet,* the availability of assistance funds was not conditioned upon any status or class trait that the included members were powerless to change, but rather upon a choice that was within the appellees' discretion to freely exercise. The appellees had the means available, at all times, to remove the disability and reap the benefits of the state assistance programs;[53] they flatly refused to do so.[54] Therefore, simply because the group required to make the choice is aliens should not mandate application of the strict scrutiny reviewing standard absent the infirmity that warrants the elevation of alienage classifications to the suspect level. Consequently, the statute in *Mauclet* should have been viewed from a different perspective.

Perhaps judicial development of a more open-ended and flexible test for assessing equal protection challenges by aliens would facilitate elimination of mechanical, facial applications of reviewing standards to state legislation in this area. Of paramount importance is the recognition that any equal protection analysis should begin with a preliminary examination of the challenged legislation that focuses on determining if the statute actually creates a suspect classification. In accordance with this approach, the Court should establish clear and precise guidelines on criteria that explain what causes alienage classifications to be characterized as suspect.[55] Un-

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HARV. L. REV. 1065, 1125 (1969). This argument, however, encounters certain structural difficulties in a situation like *Mauclet* where the appellees have voluntarily waived recourse to the political process by freely choosing to retain foreign citizenship. Further, there is apparently little justification, in a majoratarian democracy, for a minority group's resort to the courts every time the majority makes a decision adverse to the minority's interests. *See id.* at 1126.

52. *See* note 29 and text accompanying notes 28-29 *supra.*

53. *See* note 3 *supra.* Section 661(3) permits resident aliens to become entitled to benefits either by becoming citizens *or* by declaring an intention to become a citizen as soon as possible.

54. *See* 432 U.S. at 4-5.

55. Concluding that the class is suspect because an example of a discrete and insular minority, without clearly defining the indicia of suspectness, merely results in semantic circumvention of the foremost issue that the Court should address.

less the particular statute in question creates a class whose individual members are burdened by all those disadvantages that have culminated in characterizing the class as suspect, the class is not truly one deserving the broadest degree of protection guaranteed by the fourteenth amendment.

Therefore, the decision to employ a particular test for reviewing alienage-based state statutory schemes should be a conclusion, arrived at after a preliminary examination of how the statute operates in creating the classification, rather than the starting point for analysis.[56] It necessarily follows that strict scrutiny should apply only if the preliminary inquiry discloses that the statutory scheme in question creates a true suspect class. If, on the other hand, the preliminary inquiry reveals that no suspect class has been created according to the guiding criteria, but rather that the statute classifies in a manner that avoids the underlying reasons for strict scrutiny application, the Court should employ a test that requires the state to show something more than a rational relationship[57] between the legislation and the underlying state objectives.[58] Such a test would enable the Court to balance and weigh the competing interests involved without the requirement that it find a compelling state interest.[59] It would also preclude the Court from exercising its creativity in developing conceivable purposes for the classification or imagining facts which would sustain the rationality of the classification.[60]

In the final analysis, perhaps the greatest significance of the

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56. In general, the outcome of equal protection cases is predicated upon the standard that the Court determines it will employ to review the challenged statutory scheme. *See Equal Airspace, supra* note 7, at 418. It is therefore critically important for the Court to undertake the task of the preliminary inquiry to ensure that state legislation is not subjected to strict scrutiny even in those instances where no suspect class is created.

57. Justice Rehnquist, however, apparently assumes that the only alternative to strict scrutiny is the minimal scrutiny standard. *See* 432 U.S. at 21. *See also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 177-82 (Rehnquist, J., dissenting).

58. For a list of alternative reviewing standards espoused by various commentators, see note 39 *supra*. *See also* San Antonio School Dist. v. Rodriguez, 411 U.S. at 98-133 (Marshall, J., dissenting).

59. *See* Coven & Fersh, *supra* note 39, at 878-84. For example, state statutory schemes that limit the opportunity for resident aliens to engage in certain occupations or professions would require a greater degree of precision than statutes that impose limitations on access to educational assistance funds.

60. Unless blatantly arbitrary and capricious, classifications under the rational basis test will be upheld if any state of facts can be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 426 (1961). The Court has exercised considerable imagination in attributing conceivable purposes to legislative classifications. *See* Gunther, *supra* note 39, at 21.

Mauclet decision emanates from the Supreme Court's adamant refusal to apply any reviewing standard other than strict scrutiny to alienage-based state statutory schemes. Confronted with an equal protection challenge that could have been an ideal vehicle for articulating a reviewing standard that reflects the unique position that aliens occupy in American society, the Court instead chose to apply prior case law without considering the rationale upon which the prior case law was premised. When viewed in combination with the Court's prior decisions in this area, *Mauclet* imposes a virtually insuperable burden upon states to justify any consideration of alienage when enacting legislation, and any intrusion upon aliens' rights apparently will no longer be tolerated.

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